(4)

No. 09-1433

IN THE

Supreme Court of the United States

SCHAGHTICOKE TRIBAL NATION,
Petitioner-Appellant,

v.

KEN L. SALAZAR, Secretary, Department of the Interior, JAMES E. CASON, Associate Deputy Secretary, Department of the Interior, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, and INTERIOR BOARD OF INDIAN APPEALS,
Respondents-Appellees.

THE KENT SCHOOL CORPORATION, STATE OF CONNECTICUT, TOWN OF KENT, and THE CONNECTICUT LIGHT AND POWER COMPANY,
Intervenors-Appellees.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

RICHARD EMANUEL *
601 Plymouth Colony
Branford, CT 06405
(203) 483-6201
newtrials@comcast.net

* Counsel of Record — *Counsel for Petitioner*

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PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 4, 2010, and (2) granting the petition.

* * * *

Several years ago, the Court ruled that a citizen detained in the United States as an "enemy combatant" is entitled to a "fair opportunity to [be heard] before a neutral decision-maker." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). One would hope that a "state-recognized tribe of Indians who possess a state-recognized reservation," *Schaghticoke Tribal Nation v. Harrison*, 264 Conn. 829, 831, 826 A.2d 1102 (2003), and whose individual members were accorded full state citizenship status in 1973, see Conn. Gen. Stat. § 47-59a(a), would not be viewed as an "enemy" of that state during the Tribe's pursuit of federal acknowledgment. Yet that is essentially an apt description of how Connecticut politicians (state and federal) treated the Schaghticoke Tribal Nation in the period between January 29, 2004—the day the Principal Deputy Assistant Secretary–Indian affairs issued a Final Determination acknowledging the Tribe within the meaning of federal law, see 69 Fed. Reg. 5570 (Feb. 5, 2004)—and October 11, 2005, the day a politically-appointed Associate Deputy Secretary of the Department of the Interior issued a Reconsidered Final Determination declining to acknowledge the Tribe under federal law. See 70 Fed. Reg. 60101 (Oct. 14, 2005).

The politicians who opposed the Tribe's acknowledgment, asserted that their opposition was based on concerns that the criteria for federal acknowledgment, see 25 C.F.R. Part 83, were not being strictly enforced. But other motivations for the political opposition may have been the fear that if the Schaghticoke Tribal Nation achieved federal acknowledgment, it might prevail in certain land claim actions and might seek to open a gaming casino in Connecticut—which potentially could jeopardize the

state's billion-dollar revenue stream from the state's two existing casinos.[1]

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[1] It is not clear whether, or to what extent, a third federally recognized tribe could engage in gaming activities. Nevertheless, the current financial arrangement between two tribes and the State, may operate as a powerful disincentive to allow any alteration in Connecticut's tribal landscape.

Foxwoods Resort Casino is operated by the Mashantucket Pequot Tribal Nation, which was recognized by Congress in 1983. *See* 25 U.S.C. § 1751 et seq. The Mohegan Sun Casino is operated by the Mohegan Tribe, which was acknowledged through the federal administrative process in 1994. *See* 59 Fed. Reg. 12140 (March 15, 1994). Each tribe signed a Memorandum of Understanding, pursuant to which 25% of net slot machine revenues are "contributed" to the State of Connecticut. "Since 1993, the [Mashantucket Pequot] Tribe has given more than $3 billion to Connecticut under this agreement." www.mashantucket.com/TribalCommitments.aspx (last visited Oct. 26, 2010). *See* State of Connecticut, Division of Special Revenue, Schedule of Selected Video Facsimile/Slot Machine Data for Foxwoods Casino, at www.ct.gov/dosr/FosltWeb.pdf (last visited Oct. 26, 2010). Since 1996, the Mohegan Tribe has contributed approximately $ 2.5 billion. *See id.*, at www.ct.gov/dosr/lib/dosr/MosltWeb.pdf (last visited Oct. 26, 2010). The Mohegan Tribe's website notes that "both the Mohegan Sun and the state's other Indian casino[,] in giving 25% of all slot revenues to the State, represent the state of Connecticut's *single largest source of revenue* other than the federal government." (Emphasis added.) www.mohegan.nsn.us/government/enterprisesDetails.aspx?e=Mohegan%20Sun (last visited Oct. 26, 2010).

The Mashantucket Pequot Tribe's Memorandum of Understanding contains this provision: "The Tribe agrees that, so long as no change in State law is enacted to permit the operation of video facsimiles or other commercial casino games by any other person and no other person within the State lawfully operates video facsimiles or other commercial casino games, the Tribe will contribute to the State a sum [the "Contribution"] equal to twenty-five per cent (25%) of gross operating revenues of video facsimile games operated by the Tribe. For purposes of this

In filing the Petition for Writ of Certiorari, the Tribe's modest goal was to gain the *opportunity* to have its "political influence" claim reviewed under a particular legal standard. In the District Court for the District of Connecticut, and in the United States Court of Appeals for the Second Circuit, the Tribe asserted that its due process right to a fair administrative *adjudicative* determination had been violated by undue political influence, as evidenced by various (and at times undisputed) acts of political pressure, influence, or intimidation, all aimed at defeating the Tribe's petition for federal acknowledgment. See Pet. for Cert., at 18-29 (summarizing the political activities). The Tribe sought to have its political influence claim reviewed *not only* under an "actual influence" standard, but under an "appearance of bias" standard as well. However, the District Court failed to review the political influence claim under the "appearance of bias" standard, and the

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paragraph, gross operating revenues shall be defined to mean the total sum wagered less amounts paid out as prizes." Memorandum of Understanding between the State of Connecticut and the Mashantucket Pequot Tribe (Jan. 13, 1993) ¶ 1, as amended by the Second Amendment to Memorandum of Understanding (April 25, 1994), at www.ct.gov/dosr/cwp/view.asp?a=2031&q=293150&dosrPNavCtr=%7C42785%7C (last visited Oct. 26, 2010). The Memorandum further provides: "In the event that any change in State law is enacted to permit the operation of video facsimiles or other commercial casino games by any other person or any other person within the State lawfully operates video facsimile games or other commercial casino games, the Tribe shall not be bound by the provisions of this Memorandum of Understanding . . . ." *Id.*, ¶ 3 (as amended April 25, 1994). The Memorandum of Understanding between Connecticut and the Mohegan Tribe contains similar provisions. See www.ct.gov/dosr/cwp/view.asp?a=2031&q=421838&dosrPNavCtr=%7C43105%7C.

Second Circuit expressly refused to apply it. See *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 134 n. 1 (2009) ("we reject the Schaghticoke's argument that we should apply a broader 'appearance of bias' standard in this action"). Accordingly, the Second Circuit reviewed the political influence claim *solely* under an "actual influence" standard. "'To support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute.") *Id.*, at 134 (quoting *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185 (2nd Cir. 1984)). In the three cases in which the Second Circuit has utilized the *Orangetown* standard, i.e., in *Town of Orangetown*, supra, in *Chemung County v. Dole*, 804 F.2d 216, 222 (2nd Cir. 1986), and in this case, the Second Circuit has applied the standard without distinguishing between *adjudicative* and non-adjudicative agency proceedings, contrary to the approach of other Circuits. See Pet. for Cert., at 33-37; Pet. Reply Br., at 2-6.

This Court issued its decision in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. ___, 129 S. Ct. 2252, on June 8, 2009, the same day that Petitioner filed its Reply Brief in the Second Circuit. The parties thereafter informed the Second Circuit by letter of the *Caperton* decision, and of its claimed relevance (in Petitioner's view) or very limited or non-relevance (in the view of Petitioner's opponents) to the issues. The Second Circuit's opinion in this case, which was released on October 19, 2009 (11 days after oral argument), and amended on November 4, 2009, does not cite *Caperton*.

Although the *Schaghticoke* case does not involve judicial disqualification, the *Caperton* decision is nevertheless highly relevant. The principles that animate *Caperton* support the Tribe's contention that its "political influence" claim should be reviewed under an "appearance of bias" standard—a standard often recognized, even prior to *Caperton*, by federal courts when reviewing claims of undue political influence on federal adjudicative proceedings.

As a threshold matter, *Caperton* is seen as having effected a significant change in due process jurisprudence. See, e.g., *State v. Allen*, 778 N.W.2d 863, 880, 904 (Wis. 2010) (per curiam) ("All state courts are bound by the teachings of *Caperton*, and *Caperton* is generally viewed as a major case involving more than campaign contributions and affecting court practice across the country."; "One need not understand the furthest implications of the decision to know that these implications will be significant."); *People v. Freeman*, 222 P.3d 177, 182 (Cal. 2010) ("*Caperton* both reviewed the court's jurisprudence in this area and extended it.").

Of course, it may take many years before the full contours and ramifications of the *Caperton* decision are known. See *State v. Allen*, supra, 880 ("How should the principles articulated in *Caperton* be applied in different factual settings? Answering this question is no easy task . . . .") As the *Allen* court stated, "[a]n outpouring of literature and commentary discussing a 'post-*Caperton*' landscape has already begun. State courts, and most immediately our own, are on the front lines of resolving the boiling and at times contentious uncertainty.") (footnote omitted). *Id.*, 904-905. "In the end, *Caperton* is a provocative case as much for the questions it does not

answer as for the one it does." Comment, "*Caperton v. A. T. Massey Coal Co.*: Due Process Limitations on the Appearance of Judicial Bias," 123 Harv. L. Rev. 73, 78 (2009).

The Petitioner does not have the luxury of waiting to see whether, and how, *Caperton* may apply in different settings. Two lawsuits brought by the Tribe (in 1998 and 2000) seeking restoration of reservation land, and one lawsuit filed by the United States (in 1985) seeking to condemn a portion of the reservation land for government use, have been stayed by the District Court pending the resolution of the Tribe's petition for federal acknowledgment. The Tribe urges the Court to act favorably on this petition, so the Court may consider whether *Caperton* requires a federal court to evaluate, under an "appearance of bias" standard, a claim of undue political influence on a federal adjudicative proceeding.

For present purposes, the fundamental question arises: Is a "risk of actual bias," or a "probability of actual bias," or an "unconstitutional 'potential for bias,'" the functional equivalent of an "appearance of bias" or "appearance of impropriety?"

Undeniably, there is a very close relationship between some of these concepts. See *Caperton*, supra, 2268 (Roberts, *C.J.*, jointed by Scalia, Thomas, and Alito, *Js.*, dissenting) ("there are a number of factors that could give rise to a 'probability *or* 'appearance' of bias") (Emphasis added.). See also, Pamela S. Karlan, "Comment: Electing Judges, Judging Elections, and the Lessons of *Caperton*," 123 Harv. L. Rev. 80, 98 (Nov. 2009) ("...*Caperton* involves a complex jurisprudence of appearance. Justice Kennedy framed the issue as whether there was a 'serious risk of actual bias – based on objective and reasonable

perceptions.' That final clause means that, although Justice Kennedy later distinguished between federal constitutional requirements and state recusal standards that focus on 'the appearance of partiality,' his proposed standard was also based on appearances: how do outside observers assess the likelihood of bias or prejudgment?") (footnotes omitted.). See also, Terri R. Day, "Buying Justice: *Caperton v. A.T. Massey*: Campaign Dollars, Mandatory Recusal and Due Process," 28 Miss. C. L. Rev. 359, 370 (2009) (discussing questions asked at the *Caperton* oral argument about the related concepts of "probability of bias" and "appearance of bias").

There are very recent cases, and commentary, that touch on the question of whether *Caperton* supports the proposition that the "appearance of bias" or impropriety may violate a litigant's right to due process of law.

At least one state supreme court has expressed the view that *Caperton* did not endorse an appearance of bias standard for judicial disqualification as a matter of federal due process. See *People v. Freeman*, 222 P.3d 177, 178, 184 (Cal. 2010) (reviewing *Caperton*, and concluding that the "mere appearance of bias" is not sufficient to require judicial disqualification as a matter of federal due process). But several courts and jurists have, either explicitly or implicitly, suggested the opposite. See e.g., *Rissler v. Jefferson County Board of Zoning Appeals*, 693 S.E.2d 321, 328 (W. Va. 2010) (per curiam) (post-*Caperton* decision stating, inter alia, that "the *appearance of justice* may require the disqualification of an adjudicator, even when the adjudicator does not have an actual interest in a matter over which he/she presides") (Emphasis added.); *Wersal v. Sexton*, 613 F.3d 821, 845 (8th Cir.

2010) (Bye, *J.*, dissenting) ("Our law dictates that a *mere appearance of bias*, without a showing of actual bias, *is sufficient* in some circumstances to violate the due process rights of litigants. See *Caperton v. A.T. Massey . . . .*") (Emphasis added.); *Brady et al. v. Attorney Grievance Commission*, 486 Mich. 997, 1014 n. 10 (2010) (Weaver, J.) ("'The test for determining whether an *appearance of impropriety* exits *as laid out* in *Caperton* . . . is 'whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.'") (quoting *Caperton*, at 2255) (Emphasis added.); *City of Manassa v. Ruff*, 235 P.3d 1051, 1057 (Colo. 2010) (en banc) ("It is, in fact, the rare situation that objectively poses such an *appearance of or* actual conflict of interest that due process compels disqualification.") (citing to *Caperton*, at 2259, 2267, for the stated proposition) (Emphasis added.). See also, *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010) (Stevens, Ginsburg, Breyer, and Sotomayor, *Js.*, concurring in part and dissenting in part) ("'The difficulties of inquiring into actual bias,' we further noted [in *Caperton*], 'simply underscore the need for objective rules,' *id.*, at ___, 129 S. Ct. 2252, 173 L. Ed. 2d 1208—rules which will perforce turn on *the appearance of bias* rather than its actual existence.") (Emphasis added.).

Caperton involved "extreme facts" and an "extraordinary situation." See *Caperton*, supra, 2265. But this case, too, involves extremes—of political intimidation and manipulation. This case includes a threat by a powerful Congressman against a Secretary of the Interior who had participated in the process leading to the decision to acknowledge the Schaghticoke Tribal Nation, see Pet. for Cert., at 24-26, and

this also is a case in which the Federal District Court Judge who was supervising the acknowledgment process for Petitioner, wrote a *private* letter to the Governor of Connecticut. See Pet. for Cert., at 27 (assuring the Governor that her "frustration and impatience is fully warranted," and stating that the judge's action in granting a final extension of time to the Tribe, "reflects a caution intended to avoid a reversal by another Court which might buy a due process argument."). Such "political" actions undermine the confidence of the individual litigant, and of the public, in the integrity of our justice system. See *Free Enterprise Fund and Beckstead and Watts, LLP v. Public Company Accounting Oversight Board et al.*, 130 S. Ct. 3138, 3174-3175 (2010) (Breyer, *J.*, with whom Stevens, Ginsburg, and Sotomayor, *Js.*, join, dissenting) ("'[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they *appear to the public to be avoiding it*, if confidence in the system of representative Government is not to be eroded to a disastrous extent.'") (Emphasis added.).

In films depicting the old West, an oft repeated cry was "let's give him a fair trial, then we'll hang him."[2] In this case, the Schaghticoke Tribal Nation believes that the first step was omitted.

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[2] The phrase appears in various forms. See, e.g., *Frost v. State*, 314 S.W.2d 33, 38 (Tenn. 1958) (Swepston, *J.*, concurring in the result) (noting the "former law west of the Pecos, where the general principle was "Give the rascal a fair trial and then hang him."). In a 1985 film, *Silverado*, the following line is used: "We're gonna give you a fair trial, followed by a first class hanging." See www.imdb.com/title/tt0090022/quotes (last visited Oct. 26, 2010).

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for a Writ of Certiorari, and in the Petitioner's Reply Brief, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, and grant the Petition and review the judgment and opinion below or, in the alternative, grant the Petition, vacate the judgment, and remand for further consideration.

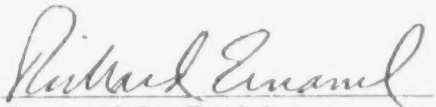
Respectfully Submitted,

RICHARD EMANUEL *
601 Plymouth Colony
Branford, CT 06405
(203) 483-6201
newtrials@comcast.net

* Counsel of Record *Counsel for Petitioner*

CERTIFICATE OF COUNSEL

As counsel for the Petitioner I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.



Counsel for Petitioner

October 29, 2010